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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 276

COLUMBUS AND CHICAGO MOTOR FREIGHT, INC.,
Appellant,

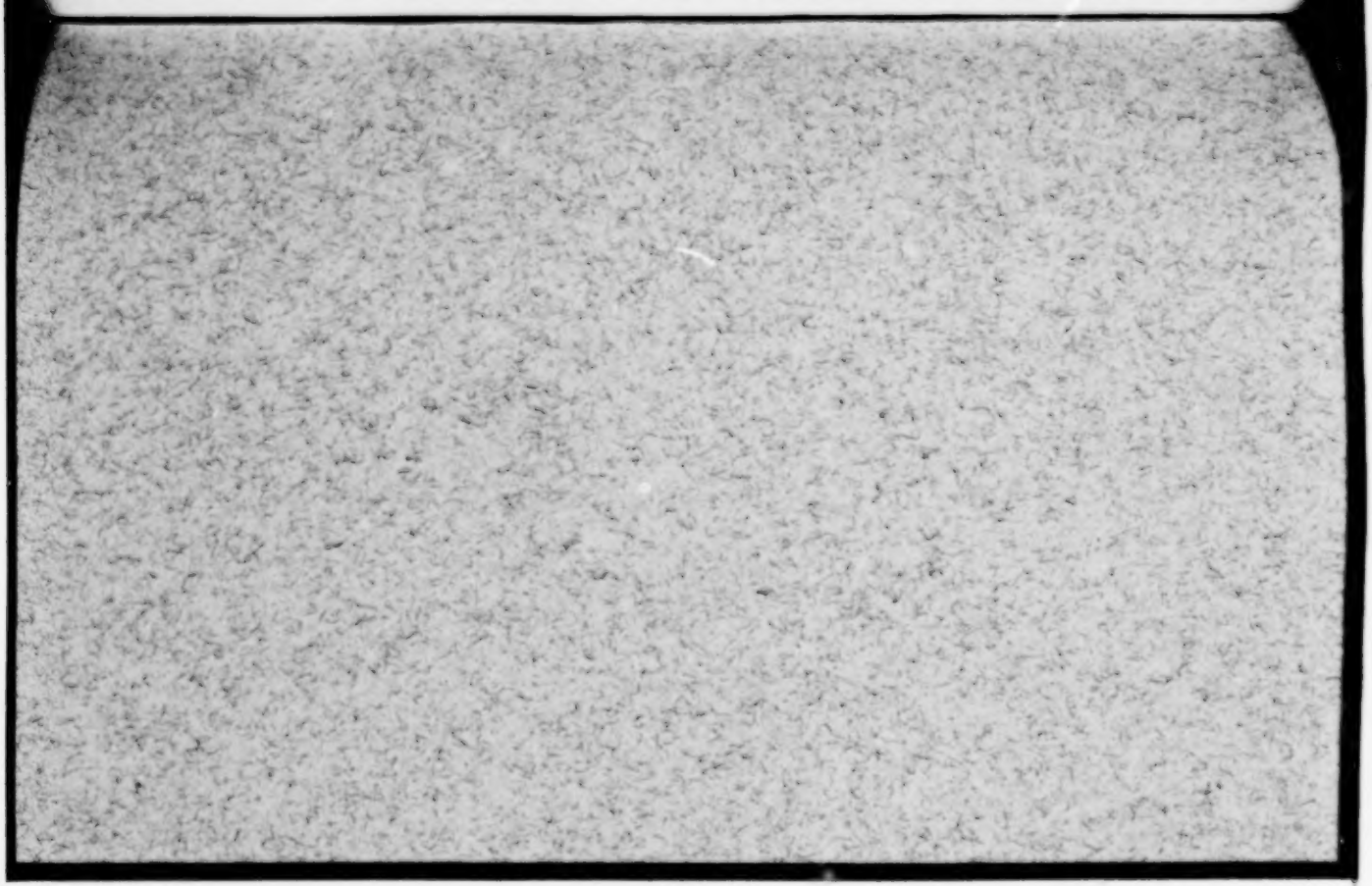
vs.

PUBLIC SERVICE COMMISSION OF INDIANA,
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

PETITION FOR REHEARING.

PHILIP LUTZ,
ALVIN C. JOHNSON,
JOHN P. LUTZ,
TAYLOR C. BURNESON,
Counsel for Appellant.



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Now comes appellant, Columbus and Chicago Motor Freight, Inc., and says that the Court, on October 14, 1940, entered the following order in the above-entitled case:

> "*Per curiam:* The judgment is affirmed. Hendrick *v.* Maryland, 235 U. S. 610; McDonald *v.* Thompson, 305 U. S. 263; Welch *v.* New Hampshire, 306 U. S. 79; Eichholz *v.* Public Service Commission, 306 U. S. 268."

Complaining of said order, appellant respectfully says that the cases which are cited therein are not decisive of the issues in the above-entitled cause for the following reasons:

I.

In the case of *Hendrick* v. *Maryland,* 235 U. S. 610, decided January 5, 1915, Hendrick, who resided in the

District of Columbia, challenged the validity of a Maryland statute requiring him to obtain a certificate from the commissioner of motor vehicles of that State. The court held that inasmuch as he had not applied for a certificate, he could not be heard to complain that the statute in question was arbitrary and unreasonable, and the court said that a mere inspection of its provisions would not warrant that conclusion.

The above-entitled case differs from the *Hendrick* case in that (1) appellant applied for a certificate as required by the Indiana statute in question, but was unable to obtain one because of the arbitrary and unreasonable action of the Indiana Commission and (2) the "Motor Carrier Act, 1935" (49 U. S. C. A. 304) had not then been enacted by Congress and the question of supersedure was not before the court for its consideration.

II.

In the case of *McDonald* v. *Thompson*, 305 U. S. 263, decided December 5, 1938, McDonald filed an application with the Texas Commission for a certificate to operate over certain Texas highways. The application was denied for the reason that said highways were congested and burdened with traffic. (This is not the reason for the denial of appellant's application filed with the Indiana Commission.)

The Texas Court of Civil Appeals upheld the Commission's order, and McDonald then applied for and obtained an order from the United States District Court restraining the Commission and Texas enforcement officers from interfering with his operations over the highways in question.

The Commission and the other defendants appealed to the Circuit Court of Appeals which reversed the District

Court, said Court finding that the Commission had acted within its constitutional and statutory powers. The Circuit Court pointed out, in doing so, that the Texas statute empowered the Commission to deny McDonald's application for the reason set forth in its order, and that no question had been raised concerning the reasonableness of the order.

McDonald then appealed to this Court which based its decision, not upon the reasonableness of the Commission's order, but upon the fact that McDonald was not entitled to receive a certificate from the Interstate Commerce Commission because he could not qualify under the "grandfather" clause of the "Motor Carrier Act, 1935".

The *McDonald* case, therefore, is not decisive of the above-entitled case because (1) the Texas Commission acted within its constitutional and statutory powers, whereas the Indiana Commission did not, (2) McDonald did not question the reasonableness of the order, whereas appellant does, and (3) the court did not pass upon the supersedure question which is one of the principal questions to be decided in the above-entitled case.

III.

In the case of *Welch* v. *New Hampshire*, 306 U. S. 79, decided January 30, 1939, this Court had under consideration a New Hampshire statute prescribing maximum hours of service for drivers, the alleged violation of which by The Welch Company resulted in the suspension of its registration certificates by the New Hampshire Commission.

The Welch Company, contending that the provisions of the New Hampshire statute had been superseded by the "Motor Carrier Act, 1935", first appealed to the New Hampshire Supreme Court which upheld the provisions of

the statute. It then appealed to this Court which held that the provisions of the statute had not been superseded by the "Motor Carrier Act, 1935" at the time in question, because the Interstate Commerce Commission, although it was empowered to prescribe maximum hours, had not yet done so.

The *Welch* case, therefore, is not decisive of the above-entitled case in that (1) the New Hampshire Commission acted within its constitutional and statutory powers, whereas the Indiana Commission did not, and (2) this Court did not pass upon the broad question of supersedure which is now before it in this case.

IV.

In the case of *Eichholz* v. *Public Service Commission*, 306 U. S. 268, decided February 27, 1939, Eichholz operated in interstate commerce over certain highways in Missouri, Iowa and Kansas. The Missouri Commission had a general rule in effect which was designed to prevent any carrier operating through Missouri under an interstate certificate issued by it from transporting a shipment from one point in the State to another point in the State, even though it be transported through some other State enroute between point of origin and point of destination.

Violating this rule, Eichholz transported shipments from St. Louis, Missouri to Kansas City, Missouri, by way of Kansas City, Kansas, and his interstate certificate was revoked by the Commission. Passing upon the validity of the Commission's order, the Court said:

> "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body

to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded.

"Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question.

"Rule 44 was plainly designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic. The rule simply sought to hold to his choice the one who had sought and obtained a permit exclusively for interstate transportation. Appellant was entirely free to conduct that transportation if he did not engage in the intrastate business for which he had deliberately refrained from qualifying himself. We cannot see that the rule on its face imposed any improper burden upon interstate commerce and the question is whether it did so through the application that the Commission has made of it."

The *Eichholz* case, therefore, is likewise not decisive because (1) Eichholz violated a valid rule governing his operations under a certificate issued by the Missouri Commission, whereas, the Indiana Commission is attempting to bar appellant from using its highways under any conditions, (2) the question of supersedure was not at issue in that case, whereas it is in this one, and (3) the constitutionality of the Missouri statutes was not challenged by Eichholz, whereas the constitutionality of the Indiana statutes, as administered by the Indiana Commission, is one of the principal questions before the Court in this case.

Wherefore, appellant respectfully petitions the Court for a rehearing of the above-entitled case.

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November 7, 1940.

Certificate of Counsel.

(Rule 33.)

I, Taylor C. Burneson, counsel for appellant, hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

TAYLOR C. BURNESON.